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REMARKS/ARGUMENTS

TELEPHONIC INTERVIEW SUMMARY OF June 16, 2009

Date of Interview: 06/16/2009

Form of Interview: Telephonic

Attendees: Mark S. Peloquin (Applicant's Attorney)

                             Borissov, Igor N (Examiner)

Exhibits: None

Claims Discussed: Claims 1 through 40

Prior Art Discussed: Jotkowitz (2003/0187725 A1)

Proposed Amendments: None
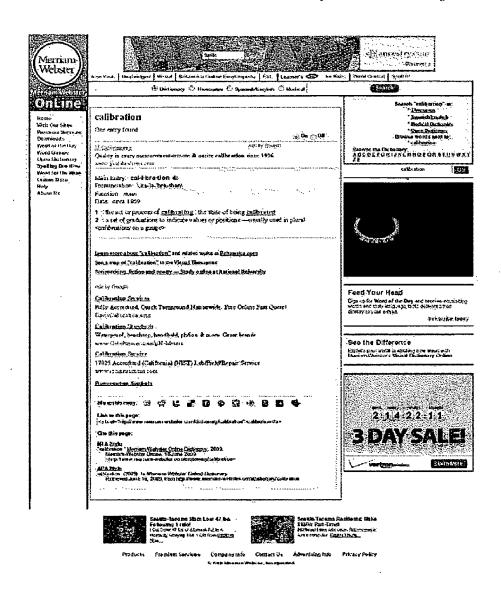

Other Matters Discussed: Difference between "calibrate" and "average."

Outcome of Interview:

1.   Calibration or calibrate is not equivalent to average and the Jotkowitz

reference is not teaching calibration.

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http://www.merriam-webster.com/dictionary/calibration   6/16/2009

Exhibit 1. Definition of "calibration" from Merriam-webster.com

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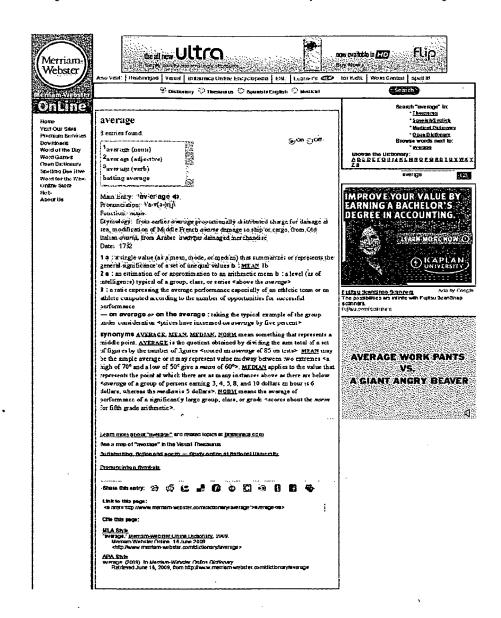calibrating - Definition from the Merriam-Webster Online Dictionary   Page 1 of 2

http://www.merriam-webster.com/dictionary/calibrating   6/16/2009

Exhibit 2. Definition of "calibrating" from Merriam-webster.com

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average

3 entries found.

¹average (noun)
²average (adjective)
³average (verb)
batting average

Main Entry: ¹av·er·age
Pronunciation: \ˈa-v(ə-)rij\
Function: *noun*
Etymology: from earlier *average* proportionally distributed charge for damage at sea, modification of Middle French *avarie* damage to ship or cargo, from Old Italian *avaria*, from Arabic *'awārīya* damaged merchandise
Date: 1732

1 a : a single value (as a mean, mode, or median) that summarizes or represents the general significance of a set of unequal values b : MEAN 1b
2 a : an estimation of or approximation to an arithmetic mean b : a level (as of intelligence) typical of a group, class, or series <above the *average*>
3 : a ratio expressing the average performance especially of an athletic team or an athlete computed according to the number of opportunities for successful performance
— on average *or* on the average : taking the typical example of the group under consideration <prices have increased on *average* by five percent>

synonyms AVERAGE, MEAN, MEDIAN, NORM mean something that represents a middle point. AVERAGE is the quotient obtained by dividing the sum total of a set of figures by the number of figures <scored an *average* of 85 on tests> MEAN may be the simple average or it may represent value midway between two extremes <a high of 70° and a low of 50° give a *mean* of 60°>. MEDIAN applies to the value that represents the point at which there are as many instances above as there are below <*average* of a group of persons earning 3, 4, 5, 8, and 10 dollars an hour is 6 dollars, whereas the *median* is 5 dollars>. NORM means the average of performance of a significantly large group, class, or grade <scores about the *norm* for fifth grade arithmetic>.

Learn more about "average" and related topics at britannica.com

See a map of "average" in the Visual Thesaurus

Pronunciation symbols

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MLA Style
"average." Merriam-Webster Online Dictionary. 2009.
Merriam-Webster Online. 16 June 2009
<http://www.merriam-webster.com/dictionary/average>

APA Style
average. (2009). In Merriam-Webster Online Dictionary.
Retrieved June 16, 2009, from http://www.merriam-webster.com/dictionary/average

http://www.merriam-webster.com/dictionary/average   6/16/2009

Exhibit 3. Definition of "average" from Merriam-webster.com

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rank - Definition from the Merriam-Webster Online Dictionary   Page 1 of 1

http://www.merriam-webster.com/dictionary/rank[3]   6/16/2009

Exhibit 4. Definition of "rank" from Merriam-webster.com

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Claim Rejection under 35 U.S.C. §101 & 36 U.S.C. §112 1st Paragraph

The Office rejected claims 18-24, 42-48, 51-63 and 73-77 under 35 U.S.C. §101 as being directed to non-statutory subject matter. Office Action, Jan. 6, 2009, p2-3, 4-5. Additionally, the Office rejected these claims under §112 1st paragraph as failing to disclosure how to practice the invention. Id.

Claim 73 was cancelled. Applicant has amended independent claims 18, 42, and 54 to overcome these rejections by tying the claims to another statutory class. Applicant also points out that these claims transform underlying subject matter in that a customer-agent interaction is transformed into a calibrated statistically relevant determination of the quality of service rendered by an agent. Applicant submits that the amended claims are tied to a particular machine or apparatus and/or transform a particular article into a different state or thing and that such particulars and/or things are non-trivial and as such satisfy In re Bilski, 545 F.3d 943, 88 U.S.P.Q.2d 1385 (Fed. Cir. 2008) (Bilski) as of the date of this Response to Office Action. Applicant expressly reserves the right to file amended claims in this application or in continuation applications if Bilski is modified or overturned and that such claims based on *Bilski* being modified or overturned will be without prosecution estoppel.

Applicant requests removal of the rejections under 35 U.S.C. §101 and 35 U.S.C. 112 1st Paragraph. Claims 18-24, 42-48, 54-63, and 74-77 are in condition for allowance and Applicant requests issuance of a timely notice of allowance.

Claim Rejection under 36 U.S.C. 35 U.S.C. §112 2nd Paragraph

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The Office rejected claims 24, 49-53, 60-63 and 72 under 35 U.S.C. §112 2nd

Paragraph as being indefinite for failing to particularly point out and distinctly claim the

subject matter which applicant regards as the invention.

With respect to claim 24, Applicant has amended claim 24 to provide sufficient

antecedent basis for this claim.

Claims 60-63, and 72 have been cancelled.

With respect to claim 76, the Office stated that "The term 'approximately' makes the

claim indefinite." Office Action, Jan. 6, 2009, p 4. Respectfully, Applicant maintains that

the word "approximately" does not render claim 76 indefinite. Applicant has provided

ample teaching with in the application to illustrate that the use of the word "approximately"

in relation to sampling rate; see Applicant's Specification at paragraph [0029] directly below:

> [0029] The frequency at which an agent's interactions are analyzed can be
> controlled by either the business within 106 or by the analysts within 108.
> Typically, the agent's interactions with customers will be analyzed at
> *approximately* a rate of one interaction per agent per day, indicated by X or
> a statistically relevant sample size based on the requirements of a business.
> In some embodiments, the analysis rate can be greater and will be indicated
> by a number preceding the X. For example, analyzing 4 interactions per
> agent per day would be indicated by 4X.

In spite of the above argument, Applicant has amended claim 76, thus eliminating the word

"approximately."

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Response to Rejection of Claims 1-48, 54-59, and 61-77 under 35 U.S.C. § 103(a) –

Eilbacher in view of Garrido and in further view of Jotkowitz

The Office has rejected claims 1-48, 54-59, and 61-77 under 35 U.S.C. 103(a) as being unpatentable over Eilbacher et al. (Eilbacker) [sic], (US 6,959,078) 25 October 2005, in view of Garrido (Southeast Asia; Call it a boom: Philippine call centers; Internet printout; 4 pages; 04/22/2003) and further in view of Jotkowitz (2003/0187725 A1).

Applicant respectfully points out that according to the MPEP §2143, to establish a *prima facie* case of obviousness, three basic criteria must be met

- 1st there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine reference teachings;
- 2nd there must be a reasonable expectation of success;
- 3rd the prior art reference (or references when combined) must teach or suggest all of the claim limitations."

These criteria have not been met by the Office's rejection of Applicant's claims 1-48, 54-59, and 61-77. The Office has failed to carry its burden to present a *prima facie* case of obviousness. Jotkowitz does not teach Applicant's claim limitations for which it was cited. Jotkowitz teaches **averaging** different respondent's answers with respect to questions about a participant. Such **averaging** in Jotkowitz is not the same as **calibrating** in the instant application. Jotkowitz is silent on the subject of calibrating.

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The fact that a difference exists between "calibrating/calibration", and "average or

rank" was discussed during the teleconference with the Examiner on June 16, 2009. From

the Merriam-Webster online dictionary the definition of "calibrating" is:

3: to standardize (as a measuring instrument) by determining the deviation from a standard

so as to ascertain the proper correction factors;

4: to adjust precisely for a particular function;

5: to measure precisely; *especially*: to measure against a standard.

Exhibit 2. Definition of "calibrating" from Merriam-webster.com

In contrast to "calibrating," "average" has a very different meaning as can be seen

from definition provided by the Merriam-Webster online dictionary:

1a : a single value (as a mean, mode, or median) that summarizes or represents the

general significance of a set of unequal values.

AVERAGE is the quotient obtained by dividing the sum total of a set of figures by the

number of figures.

Exhibit 3. Definition of "average" from Merriam-webster.com.

Applicant Teaches Calibration and Calibrating

Unlike Jotkowitz Applicant teaches calibrating or calibration of a group of analysts,

see for example Applicant's Specification at paragraphs: [0045]-[0049], [0052], [0056],

[0058]-[0067], [0080]-[0081].

The Office states on pp 8-10 of the Office Action:

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"Claims 1, 18, 25, 42, 49, 54, 64, and 69. Eilbacker et al. teaches a method, system and computer-readable medium having instruction embedded therein for causing a computer to implement said method for analyzing a call agent performance, said system comprising a storage device, a computer configured for receiving and storing data, and generating reports, a client agent computer/console, said method comprising:

receiving a storable representation of an interaction between an agent of a business and customers wherein the business is located in a first geographic area (C. 5, L. 10-17);

providing the storable representation to an analyst, in the second geographic area, to determine quality of service provided to a customer by the agent (a quality management system 30 is located remotely from the customers and agents) (C. 5, L. 10-17; C. 8, L. 7-37);

generating report data associated with the calibrated determination of quality of service (C. 5, L. 15).

While Eilbacker et al. teaches that said quality management system 30 can be located anywhere in the world, Eilbacker et al. does not teach that said second geographic area is subject to a wage attenuator; and that wage attenuation is utilized to reduce a cost of analyzing the service call in the second geographic area relative to the cost of analyzing the call in the first geographic area. **Also, Eilbacher et al. does not teach that the analyst has been trained to provide a calibrated determination of quality of service (emphasis added).**

Garrido discloses a practice of outsourcing various jobs in the countries, having lower wages. Specifically, India and Philippine were discussed as the countries were local citizens are paid much less then workers doing same job in the USA (See first and third pages).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Eilbacker et al. to include that said second geographic area is subject to a wage attenuator, as disclosed in Garrido, because it

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would advantageously allow to save funds and decrease the turnover rate for call

centers, as specifically stated in Garrido.

Jotkowitz teaches a method and system for monitoring professional
development, wherein the performance of workers (call agents) is monitored and a
report including calibrated (averaged) results is provided (Figs. 3-7), wherein
calibrating the results indicates necessary skill and training in doing so.

It would have been obvious to one having ordinary skill in the art at the
time the invention was made to modify Eilbacher et al. and Garrido to include that
said data in said report represents a calibrated determination of quality of service
rendered by the agent to the customers, as disclosed in Jotkowitz, because it would
advantageously allow to provide managers as well as agents a constant input as to
performance, as specifically stated in Jotkowitz [0004].

Office Action, Jan. 6, 2009, pages 8-9.

The passages the Office cited from Eilbacher and Jotkowitz are grouped directly below:

Eilbacher states at Column 5, lines 10-17:

"The present invention is also directed to a method for displaying contact center
information, including recording data associated with one or more communications
with a contact center, wherein the *recording* is *based on* one or more *recording
rules*; comparing the recorded data against predetermined contact center parameters;
displaying messages to contact center personnel, reporting contact center activity as
compared against the parameters; and storing said displayed messages."

Eilbacher, Column 5, lines 10-17 (emphasis added).

Eilbacher states at Column 8, lines 7-37:

"Contact center monitors, supervisors, clients, and third party reviewers
(hereinafter collectively referred to as "users") alike can access the communication
information via the Internet for recreation of the entire communication/transaction.
Contact center clients therefore have the ability to directly evaluate communications
made by their customers and to distribute these communications within their

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respective organization for further evaluation and review. As a result of the present invention, access to contact center transactional data is no longer limited by the number of monitor workstations 112' connected to the system because, with the present invention, any number of Internet-accessible users with proper authorization and a multimedia playback browser can query the data anytime, from anywhere.

A key feature of the present invention is the ease of remote access to the data by users. The user is no longer restricted to the proprietary equipment and software of a telephone call center to conveniently and economically access the full wealth of information that is recorded and subsequently made available for review and analysis by the present open storage portal operating with the communication contact center. The user has the option of selecting particular transactions to review, such as all calls for a particular client, for a particular product, to a particular agent, during a particular time frame, etc. In this manner, the users have web-based browser access to the full range of contact center data from anywhere in the world and are not constrained by a requirement for proprietary hardware and software in network proximity to the contact center.

Eilbacher, Column 8, lines 11-37.

Jotkowitz states at paragraph [0004]:

In many instances, however, the information tends to become static or unused, or at least not optimally used, because of the difficulty in making it available to sources that would require such information. One obvious such source which would benefit from a continuing and dynamic assessment of performance would be the employee herself, who could receive constant input as to performance, so that adjustments and changes in emphasis can be made in response to feedback. Others include, but are not limited to, managers, directors, vice presidents.

Jotkowitz Does Not Teach Calibration

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Jotkowitz has been cited by the Office to "modify Eilbacher et al. and Garrido to include that said data in said report represents a *calibrated determination of quality of service rendered by the agent* to the customers, as disclosed by Jotkowitz *emphasis added*." Office Action, Jan. 6, 2009, p 9-10. Respectfully, Jotkowitz does not suggest, mention, or teach anything related to "calibration." As discussed above and during the teleconference on June 16, 2009, Jotkowitz is concerned with averaging, where multiple respondents provide data on a participant and that data are averaged together, see for example paragraph [0093] from Jotkowitz:

> Reverting to FIG. 3 of the drawings, one of the headings with respect to each competency is that of participant's "Average Charts". By clicking on the icon in the "average chart" column, the participant would have access to important information relating to averages, and the participant's standings therein. With reference to FIG. 7, total averages are shown, once more with respect to the credibility competency. The participant's total average is shown by category, including overall (which is the average already provided in the "Overall Average" heading in FIG. 3 of the drawings), but also for overall average by category, such as self, seniors in organization, peers, employees who report to him, and clients. The participant would note that senior employees score him relatively high, representing an increase from prior feedback (4.65, an increase of 0.42), while those that report to him scored the participant's credibility at a much lower level, which is decreasing (a 3.23 score, down 0.96 from the previous round of feedback). This will alert the participant to a definite difference in the perception of his or her credibility between those senior to him, and those that report to him.

Jotkowitz, ¶ [0093].

In the passage from Jotkowitz cited above, note that a participant's results are presented in "Average Charts." Total averages or "Overall Averages" are comprised of

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categories of respondents and each category of respondent has its own average. For

example, senior employees scored the participant 4.65, while employees who report to the

participant scored the participant at 3.23. Note further that the respondents' responses will

necessarily contain respondent variability or error due to the absence of calibration

between respondents.

Unlike Jotkowitz, which introduces permanent error into its results, Applicant teaches

calibration to a given standard of the responses from a plurality of analysts to a common

input, i.e., an "internal calibration." Applicant's processes teache how to obtain individual

responses from different people that vary within a predetermined tolerance. Additionally,

Applicant teaches how to calibrate the responses from a plurality of analysts to different

standards, such as an agent's specific team supervisor and/or manager, resulting in a

"client calibration." An example of Applicant's teaching on calibration is found, for example

in paragraph [0045] from Applicant's Specification as well as in the other numerous

paragraphs cited above:

> ......With reference to **Figure 3A**, analysts review and evaluate transactions between
> agents and customers at 300. .... Initially, a calibration loop 302-304-306 provides
> uniformity in scoring an agent's performance by submitting the same agent's data to
> the entire team of analysts multiple times and reviewing the scored results between
> the analysts until the variation between analysts' scores of the same agent's data is
> within acceptable limits (*internal calibration*) *emphasis added.* The same calibration
> process follows between the team of analysts and the agent's specific team supervisor
> and/or manager. The agent, the agent's team supervisor or the agent's manager can
> be referred to as the client, in such a case, calibrating the analysts to one or more of
> these entities associated with the particular business can be referred to as a "client
> calibration." Acceptable calibration limits will be determined by the requirements of

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particular businesses; however, in one embodiment, a deviation of five percent (5%) between individual analyst's agent-scores (*internal calibration*) is one example of an acceptable level of uniformity and a deviation of five percent (5%) during a client calibration is one example of an acceptable level of uniformity *emphasis added.*

Applicant's Specification, ¶ [0045].

In the current Office Action, the Office proffers equivalence between "calibrated" and "averaged" or "ranked," using "averaged" on page 9 and "ranked" within the following statement from page 10 of the Office Action:

> Jotkowitz teaches a method and system for monitoring professional development, wherein the performance of workers (call agents) is monitored and a report including calibrated (ranked) results is provided (Figs. 3-7), wherein calibrating the results indicates necessary skill and training in doing so.

Office Action, Jan. 6, 2009, p 10.

Currently Amended Independent Claims 1, 18, 42, 54, 64 And New Independent Claims 78, 80, And 81 As Well As All Claims Depending Therefrom.

In light of the discussion above, "ranked" is not equivalent to "calibrated," neither is "averaged" equivalent to "calibrated." No form of the word "calibrate" is not found in Jotkowitz because Jotkowitz does not teach calibration. The combination of Eilbacker in view of Garrido and further in view of Jotkowitz does not provide all of the elements found in Applicant's claims. This combination does not make out the required *prima facie* case of obviousness which is required to be made out by the Office.

Thus, with respect to Applicant's currently amended independent claims 1, 18, 42, 54, 64 and new independent claims 78, 80, and 81 as well as all of the claims that depend therefrom, Jotkowitz does not teach, amongst other things, as Applicant does, how to

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obtain "a calibrated statistically relevant quality of service provided to a customer." Instead

Jotkowitz simply averages the differences between different respondents' answers.

Applicant respectfully requests the current rejection to be removed and the allowance of all

pending claims in light of this discussion.

Eilbacher Does Not Teach or Suggest Applicant's Claim Limitations

The Office asserts that Eilbacher teaches Applicant's claims 4, 20, 28, 43, 55, 63,
65, 75, and 76, i.e., "Said apparatus, wherein an analysis frequency applied to the
agent's interactions is selected from the group consisting of at least once per day,
more than once per day, and a statistically relevant sample size based on the
requirements of the business," Office Action, Jan. 6, 2009, p. 11, citing Eilbacher C.
10, L. 58-62. With respect to claims 5-7, 21-23, 29-31, 44-47, 50, 56-58, 66, 67,
70, and 71 the Office states that "Eilbacher et al. discloses that at least one of the
agent's interactions per day is analyzed for quality of service (C. 5, L. 15; C. 10, L.
58-62)." Id. The excerpts from Eilbacher cited by the Office are grouped directly
below:

> For example, if the data analyzer 400 detects that the number of calls being processed
> by the contact center 40 has increased significantly, the data analyzer could
> correspondingly increase the frequency by which the environmental data 450 is
> recorded each hour.

Eilbacher, Column 10, lines 58-62.

Eilbacher states at Column 5, lines 15:

> "predetermined contact center parameters; displaying messages to contact center
> personnel,"

Eilbacher, Column 5, lines 15.

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Applicant's claim limitations, asserted by the Office to be taught by Eilbacher at C.

10, lines 58-62, and at C. 5, line 15, (see excerpts above) are not found in Eilbacher. In the

excerpt from Eilbacher cited by the Office (Eilbacher C. 10, lines 58-62), Eilbacher teaches

that the "the data analyzer could correspondingly increase the frequency by which the

environmental data 450 is recorded each hour. (emphasis added)" Eilbacher's

environmental data 450 is described at C. 8, lines 57-66, as:

> "This data includes queue state information, such as the number of calls waiting to be
> answered in each of the various incoming queues, the number of customers on hold,
> and the average wait time per queue before a customer can contact an agent. The data
> also includes the temperature and humidity at the agents' workstations 104, the noise
> levels within the contact center 40, the number of idle agents, and the profiles of the
> agents present in the contact center 40."

Eilbacher, Column 8, lines 57-66.

Review of the Office's cited excerpts from Eilbacher illustrates that Eilbacher does not

contemplate nor teach analyzing a statistically relevant sample size with respect to an

agent's calls. There is no teaching in Eilbacher that would direct one of skill in the art to

perform Applicant's claim limitations. Neither does Eilbacher teach or suggest, among

other things, Applicant's high frequency statistically relevant recording and analysis

interval, calibrated analysis of the customer/agent interaction, accelerated training of

agents, etc.

There is not even a hint within Eilbacher to even suggest a need for Applicant's high

frequency statistically relevant recording and analysis interval. See for example

Applicant's paragraph [0029]:

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....Typically, the agent's interactions with customers will be analyzed at approximately a rate of one interaction per agent per day, indicated by X or a statistically relevant sample size based on the requirements of a business. In some embodiments, the analysis rate can be greater and will be indicated by a number preceding the X. For example, analyzing 4 interactions per agent per day would be indicated by 4X.

Applicant's Specification, ¶ [0029].

The Office is using impermissible hindsight reasoning to allegedly "find" Applicant's claim limitations within Eilbacher. Applicant submits that Eilbacher does not teach Applicant's claim limitations. Neither does Eilbacher in view of Garrido in further view of Jotkowitz teach Applicant's claim limitations. Claims 29-31, 50, 63, and 70-71 have been cancelled. Applicant requests the removal the 35 U.S.C. 103(a) rejection from claims 4-7, 20-23, 28, 43-47, 55-58, 65-67, 75, 76, and the timely issuance of a notice of allowance.

With respect to claims 9, 10, 33, 34, the excerpts from Eilbacher cited by the Office, i.e., C. 5, L. 10-17 (shown above), do not teach Applicant's claim limitation "a data base comprising a plurality of report data," because Applicant's "report data" contains the limitation from claim 1, i.e., "the report data representing a calibrated determination of quality of service rendered by the agent to the customers..." The Office has stated on page 8 and 9 of the Office Action that "Eilbacher et al. does not teach that the analyst has been trained to provide a calibrated determination of quality of service," therefore, it is impossible for Eilbacher to contain Applicant's claim limitation, since Applicant's report data (claim 9, 10) contains a limitation that is not taught in Eilbacher. Claims 33-34 have been cancelled.

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Applicant requests the removal the 35 U.S.C. 103(a) rejection from claims 9-10, and the

timely issuance of a notice of allowance.

Eilbacher Does Not Teach "Analyzing" The Customer Agent Interaction to Provide A Calibrated Determination of The Quality of Service Provided To The Customer As Applicant Does.

Eilbacher does not teach *analysis* of the agent-customer interaction in order to

obtain a calibrated determination of the quality of service rendered by the agent to the

customer. Thus, the Office's use of excerpts from Eilbacher, proffered as teaching

Applicant's claim limitations of *analysis* of the customer agent interaction are not correct

and are in conflict with the Office's admission that "**Eilbacher et al. does not teach that**

the analyst has been trained to provide a calibrated determination of quality of

service (emphasis added)." Office Action, Jan. 6, p8-9.

Eilbacher states that an object of the Eilbacher invention is "to automate the process

by which the electronic data associated with the operation of a contact center is selectively

recorded and analyzed." Eilbacher, Column 4, Lines 27-29. Eilbacher characterizes its

invention as follows: "[t]he dynamic recording system of the present invention provides a

broadly available doorway to a full range of electronic data recorded during the operation of

a contact center **40**, such as a telephone contact center. As used herein, the term, 'contact

center' refers to a telephone call center that provides information and *analysis* of the

operation and utilization of the center facilities." Eilbacher, Column 7, Lines 24-30.

Eilbacher teaches that the primary functions of its analyzer 400 are limited to: [t]he data

analyzer 400 has two primary functions; a reporting process and recording rules

management." Eilbacher, Column 9, Lines 27-29. Eilbacher goes on to teach that "the

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data analyzer 400 gleans agent performance information from the data and compares the

performance of each agent against a predetermined set of standards or goals for agents as

maintained in the contact center's standards database 460." Eilbacher, Column 9, Lines

30-33. Eilbacher teaches that "performance information" consists of:

1. transactions completed by the agent's shift or month-to-date;

2. the elapsed number of minutes/hours online with the current customer, and

3. the number of calls waiting in queue for that agent or that agent's group.

Eilbacher, Column 9, Lines 55-63.

It is clear from the above list of "performance information" items, that Eilbacher is not

teaching *analysis* of the agent-customer interaction in order to obtain a calibrated

determination of the quality of service rendered by the agent to the customer.

Eilbacher's teaches that "[t]he data analyzer 400 analyzes the environmental data

450 as isolated data, as compared to historical environmental data retained by the system

in the history database 462, and as compared to contact center standards as maintained in

the standards database 460. The results from the analysis can be output by the report

generator 464 in the form of reports.....the reports can list the temperature and humidity at

various agents' workstations 104 across time." Eilbacher, Column 10, Lines 2-11.

It is important to note that while Eilbacher uses the words "analysis" and "report,"

these words are used differently by Eilbacher and Applicant. Eilbacher does not teach as

Applicant teaches that

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[0036] "....the analysts review and evaluate agent/customer interactions to ensure that the agents have met quality of service criteria established for a particular business." In one embodiment, the evaluation process includes the areas of core skills, soft skills, selling skills, and specific know how. The analysts check core skills by analyzing the agent's method and competence in; answering the phone and greeting the customer; getting the order in the system; answering basic questions; and comprehension of a request made via email. Some reporting metrics used for report generation include the average call handle time and spelling and grammar used accurately during the interaction with the customer. Soft skills are checked by analyzing whether the agent's greetings are scripted; determining how "canned" the email responses are; determining whether the agent can handle an irate customer under pressure; and analyzing the agent's knowledge of when to engage the agent's supervisor to resolve the call. Some reporting metrics used for report generation for soft skills include whether the customer's issue was resolved with the first call, this includes metrics related to specific know how (i.e., technical support/knowledge), and how many repeat emails were required to resolve the customer's issue. Analyzing selling skills involves ranking the agent's ability to; recommend additional products (cross-sell); sell more of the product under discussion by successfully understanding the tone and intonation of the customer during the interaction; and comprehension of the products and services. Some reporting metrics used in report generation for selling skills include measurements of the agent's up-sell and cross-sell performance. In some embodiments, reporting can include scoring compliance with regulations such as the Telephone Consumer Protection Act (TCPA) or other regulations.

[0037] For example, if the customer interaction consisted of an inbound sales call where a customer called to place an order for a product, such as a camera, some of the criteria the analyst will be looking for are whether the agent has opened the call properly, acted courteously, attempted to up-sell

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(i.e., sell a higher end camera), cross-sell and add-on-sell (i.e., selling film and a camera accessory bag with the original camera order) the customer, and checking to determine if the agent was knowledgeable enough to meet the demands of the sale in order to accomplish the up-sell or cross-sell (e.g., could the agent explain the features and benefits and answer technical questions related to the product). Other criteria are employed as are appropriate for a particular industry. For example, in one embodiment, analysts will grade the interactions according to established quality monitoring criteria for a particular industry sector or a particular business. In one embodiment, an agent's performance is sampled at least once a day by the analysts generating report data and agent feedback. Report data is stored in data base 114 for later use and a portion thereof is tailored for the business and the business's agents at 108. Feedback is provided to the business and the agents at 260.

Applicants Specification, ¶ [0036-0037].

Applicant's Specification states that "**Figure 2B** and **Figure 2C** "display an embodiment of a score sheet that can be used by an analyst to evaluate and score a transaction between an agent and a customer." Applicants Specification, ¶ [0039]. Applicant's **Figure 2B** and **Figure 2C** are presented below. Eilbacher's analyzer 400 is incapable of determining quality of service as Applicant does in Applicant's claims 1 through 88. Eilbacher's reports do not contain Applicant's "calibrated measurement of quality of service rendered by the agent to the customers" Applicant's Claim 1, because as admitted by the Office; "**Eilbacher et al. does not teach that the analyst has been trained to provide a calibrated determination of quality of service (emphasis added)**." Office Action, Jan. 6, p8-9.

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Title: BUSINESS PERFORMANCE AND CUSTOMER CARE QUALITY
MEASUREMENT
Inventor: vard M. Lee   206-447   6
Docket No. 062403.P001
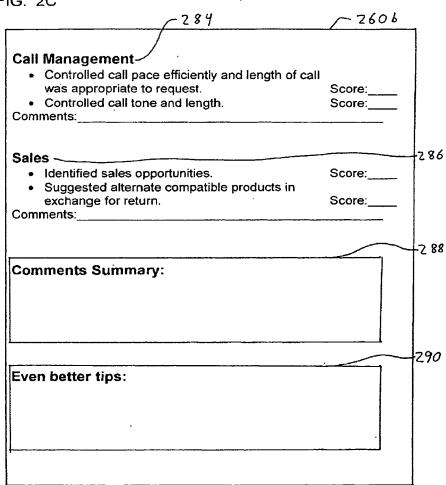Express Mail No.: ER 318145750 US
Filing Date: October 22, 2003
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FIG. 2B

260a

SCORING PARAMETERS

262

Moving forward all the UK RMA's will be shipped from the fulfillment center in France......Moving forward all the .....

Customer Service Competencies   264
Call Opening
- Used Proper Greeting.   Score:_____   266
- Asked for Transaction ID.   Score:_____   268
- Verified the Customer's Information.   Score:_____
Comments:_____   270

Customer Service Skills (Accent and Voice)   272
- Used good grammar, avoids slang or jargon.   Score:_____
- Rate of Speech mirrored that of customer.   Score:_____
- Hold courtesies were followed.   Score:_____
- Sounded confident, friendly, and polite.   Score:_____
- Set customer's expectations, used empathy if
  necessary escalated to a supervisor if necessary Score:_____
Comments:_____

Call Closing   280
- Offered additional products.   Score:_____
- Used proper closing script.   Score:_____
Comments:_____

Knowledge, Accuracy and Resolution   282
- Demonstrate knowledge of the product process. Score:_____
- Credit card authorization process followed.   Score:_____
- Offered alternate products; add on sales.   Score:_____
- Accurate and concise information was given to
  the customer.   Score:_____

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Title: BUSINESS PERFORMANCE AND CUSTOMER CARE QUALITY
     MEASUREMENT
Inver   Howard M. Lee   206   1336
Docket No.: 062403.P001
Express Mail No.: ER 318145750 US
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FIG. 2C

Applicant's Specification Figure 2B and Figure 2C.

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Thus, the Office's use of excerpts from <u>Eilbacher</u> as teaching Applicant's claim limitations of **analysis** of the customer agent interaction are not correct.

With respect to the rejection of claims 13-15, 16, and 37-39, the Office has interpreted Applicant's claim limitation as failing to "recite structural elements but recite an intended use of the system" citing to MPEP 2106 (II) (C). Applicant respectfully disagrees and states for the record that these claims clearly specify a known geographic area for the first geographic area and a known geographic area for the second geographic area and in so doing provide a limitation thereby. Claims 37-39 have been cancelled. Applicant's use of the word "wherein," in claims 13-16, does not remove limitation imparting effect from the words that follow the "wherein" in these claims. Applicant requests that the 103(a) rejection be removed from claims 13-16 and that a timely notice of allowance be issued by the Office.

Claims 17, 24, 41, 48, 53, 59, 61, 68, 77. As discussed above, <u>Jotkowitz</u> does not teach calibration, therefore <u>Jotkowitz</u> does not teach Applicant's claim limitations as the Office has asserted. The Office asserts that Applicant's claim language, as shown in Applicant's claim 17 represents an intended use of the system, and, therefore, not given patentable weight." <u>Office Action, Jan. 6, 2009, p. 12</u>. Applicant's currently pending claim 17 reads:

> Claim 17. (previously presented) The apparatus of claim 1, wherein a calibration selected from the group consisting of an internal calibration, a client calibration, an anonymous transaction simulation, and a quality audit has been applied to the analyst to facilitate the calibrated determination of quality of service.

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Respectfully, Applicant disagrees with the Office's assertion that Applicant's claim language

presents an intended use of the system. To the contrary, through claim 17, Applicant has

used a Markush Group to specified the type of calibration that "has been" applied to the

analysts to facilitate the calibrated determination of quality of service. Applicant's use of

"has been" is past tense, which means that it has been done, not that it "might" be done in

the future.   In order to obtain a calibrated determination of quality of service, the analysts

must be calibrated, hence Applicant's claim language is a claim limitation not an intended

use. The foregoing argument applies to claims 48, 59, 68, and 77. Claims 41, 53, and 61

have been cancelled. Claim 24 has been amended, and the Office's prior comments no

longer apply. Applicant requests that the 103(a) rejection be removed from claims 17, 48,

59, 68, 77 and that a timely notice of allowance be issued by the Office.

Use By The Office of MPEP 2106 (II) (C) Is Contrary to CourtPrecedentFromBoth The CCPA And The CAFC, Which Have Held That Claim Limitations Can Be Characterized With Functional Language

With respect to the rejection of claim 62 by the Office, the Office has stated that

"Information as to 'wherein the calibration reduces deviations between
individual analyst's to a value selected from the group consisting of
approximately three percent (3%), *approximately* five percent (5%), a value
specified by the business' does not recite structural elements but recited an
intended use of the system. Therefore, the limitations, recited in the claims,
are not given patentable weight. MPEP 2106 (II) (C) states: 'Language that
suggests or makes optional but does not require steps to be performed or
*does not limit a claim to a particular structure does not limit the scope of a
claim or claim limitation*.'"

Office Action, Jan. 6, 2009, p 12.

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Applicant has cancelled claim 62, however similar language is found in new claim 79,

therefore the following discussion of case law support for functional language is provided in

support thereto.   Respectfully, Applicant disagrees with the Office's statement that

Applicant's claim language does not recite a claim limitation.   Rather, Applicant's claim

language is a permissible use of **functional language** to define a claim limitation.   In

making out the current rejection, the Office has improperly extended the guidance of MPEP

2106 II (C) to extinguish the use of functional language in a claim.   As such, the rejection of

claim 62 is in violation of the long standing and accepted practice of using functional

language to define claim limitations.   Use of functional language in claim drafting, even at

the precise point of novelty, has long been upheld by the CCPA (predecessor court to the

CAFC) and now the CAFC, and is reflected in the guidance of the MPEP as a proper

technique for claiming.

For example, in In re Swinehart, the CCPA affirmed the use of functional language

when it held:

> "We take the characterization "functional", as used by the Patent Office and
> argued by the parties, to indicate nothing more than the fact that an attempt is
> being made to define something (in this case, a composition) by what it does
> rather than by what it is (as evidenced by specific structure or material, for
> example).   In our view, there is nothing intrinsically wrong with the use of
> such a technique in drafting patent claims.   Indeed we have even recognized
> in the past the practical necessity for the use of functional language."

In re Swinehart, 439 F.2d 210, 169 USPQ 226, 228-29 (C.C.P.A. 1971).

The CCPA has instructed that even though a portion of a claim is functional that is no

reason to afford that portion of the claim with no weight.   In In re Land, the CCPA held:

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> "It is true that the italicized portions [of claim 70] are "functional" but we do not
> regard that as good ground to give them "no Weight" in view of the third
> paragraph [currently sixth paragraph] of 35 U.S.C. 112. We give them weight
> and with this limitation we think claims 70 and 71 are limited to deferred
> diffusion built into the structure recited, thereby being limited to the actual
> invention disclosed and hence allowable for the same reasons given by the
> board..."

In re Land, 386 F.2d 866, 151 USPQ 621 (C.C.P.A. 1966).

In In re Echerd, the Court held that "there is nothing inherently wrong in defining
something by what it does rather than what it is." The limitations at issue were:

> "having sufficient flexibility and wet strength to permit...."

and

> "having sufficient adhesive characteristics to firmly bond..."

In re Echerd, 176 U.S.P.Q. (BNA) 321 (C.C.P.A. 1973).

Upholding its predecessor court's long standing precedent, the CAFC has continued
to uphold the use of functional language in claims as a valid practice. In In re Weiss, the
invention was related to athletic shoes with break-away cleats, which would break-away at
a preselected level of force in order to reduce the risk of injury to a wearer. The Examiner's
position was that it would be improper to read the functional limitations relating to the pre-
selected level of force. On appeal the CAFC reversed the rejection and held:

> "Here, applicant has chosen the phrase "preselected level of force" as a
> specific limitation in the break-away means plus function element to indicate a

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specific level of force, determined in advance, at which the cleat will break-away. This is further described in the specification to mean that level of force at which the cleat must break off in order to prevent injury to the wearer without breaking off during athletics involving noninjurious force levels.

The board incorrectly interpreted this break-away means limitation, giving no effect to the term "preselected level of force" to require only that the cleat break away from the sole at some unknown large level of force not determined in advance."

In re Weiss, 26 USPQ 2 1885 (Fed. Cir. 1993) (unpublished).

On the foregoing reasoning, the CAFC held the claimed invention patentable and affirmed the claim language "preselected level of force."

In the instant application, Applicant's new claim 79 reads:

Claim 79. (New) The method of claim 78, wherein the calibration process reduces deviations between individual analyst's scores to a value selected from the group consisting of up to three percent (3%), up to five percent (5%), a value specified by the business.

Applicant's New Claim 79.

In Applicant's new claim 79, a Markush Group is used to select deviations between individual analyst's scores, where the deviations are expressed with functional language. Consistent with court precedent, Applicant's use of functional language in claim 79 is proper and should be afforded weight by the Office when examining the claim.

In No Case Should Claim Language Be Ignored By The Office When Determining Patentability.

Claim language must be considered in its entirety when determining patentability.

The Office must not dissect the claim language when determining patentability. No

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limitation or wording anywhere in the claim can be ignored in determining patentability. In re Stencel, 828 F.2d 751 (Fed. Cir. 1987). Such rejections are improper and inconsistent with the statute. Id. Thus, the rejections of claims 13-15, 16, 37-40, 49, 50-53, 60, and 62 are not properly made. The Office should consider all the words of the claim during the patentability determination; no dissection is permitted by statute, reliance on MPEP 2106 II (C) in manner of the present Office Action is contrary to case law. Applicant notes that the MPEP is a set of guidelines and is controlled by case law, the MPEP is not superior to case law.

Claim Rejection under 35 U.S.C. § 102(e) as being anticipated by Eilbacher et al. (US 6,959,078).

The Office has rejected claims 49-53 and 60 as being anticipated by Eilbacher et al. (US 6,959,078), hereinafter Eilbacher.

Response to Rejection of Claims 49-53, and 60 under 35 U.S.C. § 102(e)

With respect to the 35 U.S.C. 102 (e) rejections, respectfully, the Office has not made out the required *prima facie* case of anticipation with the Eilbacher reference.

A *primafacie* case of anticipation is established when the Office provides:

1. a single prior art reference
2. teaches or enables
3. each of the claimed elements (arranged as in the claim)
4. expressly or inherently
5. as interpreted by one of ordinary skill in the art.

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"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987)., Scripps Clinic & Research Found. V. Genentech Inc., 927 F.2d 1565, 18 USPQ 2d 1001, 1010 (Fed. Cir. 1991). MPEP 2131. "The identical invention must be shown in as complete detail as is contained in the...claim." Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

In support of the rejection of claims 49-53 the Office states that:

Information as to: "wherein the storable representation *is capable* of being analyzed for quality of service in the second geographic area by an analyst, *the second geographic area is subject to a geographic wage attenuator* and *the analysts has been trained* to provide a calibrated determination of quality of service rendered by the agent *during the service call*" do not recite a structural element, but recite an intended use of the system, and, therefore, is not given patentable weight. MPEP 2106 (II) (C) states: "Language that suggests or makes optional but does not require steps to be performed or does not limit a claim to a particular structure does not limit the scope of a claim or claim limitation."

Applicant has cancelled claim 60 and amended claims 49 and 52. In response to the rejection of claims 49-53, Applicant's arguments presented directly above respecting the Office's use of MPEP 2106 II (C) to prohibit use of functional language in Applicant's claims and to excise words from Applicant's claim during the patentability determination are applicable here and are proffered in support of the patentability of claims 49-53.

Pertaining to claim 49, the Office has admitted that "Eilbacher et al. does not teach that the analyst has been trained to provide a calibrated determination of

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quality of service." Office Action, Jan. 6, 2009, p 8-9. This element is found within

Applicant's claim 49, thus Eilbacher cannot anticipate Applicant's claim 49 since not

all of Applicant's claim limitations are found within Eilbacher. Additionally, Eilbacher

does not teach "analyzing" the customer-agent interaction as Applicant does, see

discussion above titled "**Eilbacher Does Not Teach "Analyzing"...**" on pages 42-

47 above in support of the fact that Eilbacher does not teach Applicant's claim

limitations. Thus, in light of Applicant's arguments and the Office's admission (Office

Action, Jan. 6, 2009, p8-9 quoted above) Applicant requests removal of the 35

U.S.C. 102(e) rejection to claims 49-53 and the issuance of timely notice of

allowance.

Applicant's New Claims 78-88.

For the foregoing reasons provided above, Eilbacher, Garrido, and Jotkowitz either

singly or in combination do not teach the claim limitations found in Applicant's New claims

78-88, such as but not limited to accelerated training of analyst..., calibrating analysts...,

producing a calibrated determination of the quality of service rendered to a customer...,

monitoring in real time..., analyzing in nearly real time..., etc. Neither do these references

teach: calibration of a group of analysts as discussed above, using higher frequency

sampling or multiple types of calibrations to accelerate training of the analysts (New claim

77); that the higher frequency is approximately six times a day or at a rate that is

statistically relevant for a particular business. Thus, the cited references do not disclose

Applicant's claim limitations. New claims 78-88 are in condition for allowance and Applicant

requests the timely issuance of same.

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CONCLUSION

Claims 9, 10, 18, 19, 20, 21, 22, 23, 24, 42, 45, 46, 47, 49, 52, 54, 55, 56, 64, 67, 74,

75, 76 and 77 have been amended.

Claims 25-41, 60-63, and 69-73 have been cancelled.

Claim 78-88 are new.

Applicant respectfully submits that all claims are in condition for allowance and

requests such.

Communication via cleartext email is authorized.

Respectfully submitted,

PELOQUIN, PLLC

July 6, 2009
Date

Mark S. Peloquin
Mark S. Peloquin, Esq.
USPTO Registration # 50,787

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this correspondence is being transmitted herewith via facsimile transmission to Telephone No. (571) 273-8300 on the date indicated below and is addressed to: Mail Stop AMENDMENT, Commissioner for Patents, Box 1450, Alexandria, Virginia 22313-1450.

Date of Deposit: July 6, 2009

 Mark S. Peloquin, Esq.
(Typed or printed name of person transmitting paper or fee)

Mark S. Peloquin   _July 6, 2009_
(Signature of person transmitting paper or fee)   Date